

Journal of Collective Bargaining in the Academy

Volume 0 *National Center Proceedings 2016*

Article 27

September 2016

Panel Handout: LGBT Issues in Higher Education Labor Relations - Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination

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Recommended Citation

(2016) "Panel Handout: LGBT Issues in Higher Education Labor Relations - Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination," *Journal of Collective Bargaining in the Academy*: Vol. 0 , Article 27.

Available at: <http://thekeep.eiu.edu/jcba/vol0/iss11/27>

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U.S. Equal Employment Opportunity Commission

Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination

(Last Updated 08-27-15)

Overview

The Commission adopted its current Strategic Enforcement Plan (SEP) in December of 2012. The SEP includes "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply" as a top Commission enforcement priority.

Consistent with this priority, the Commission's General Counsel formed an LGBT working group that provides advice and input to the Agency's litigators on developing related litigation vehicles. This work group also coordinates internal initiatives and policies, trains internal staff, and conducts outreach with external stakeholders.

In addition, Agency litigators have filed lawsuits and amicus curiae briefs in various courts addressing a multitude of LGBT-discrimination-related issues. These include:

Private Sector Litigation

- ***EEOC v. Deluxe Financial Services Corp.***, (D. Minn. Civ. No. 0:15-cv-02646-ADM-SER, filed June 4, 2015). The EEOC sued Deluxe Financial Services Corporation, a check-printing and financial services corporation, alleging that after charging party, Britney Austin, began to present at work as a woman and informed her supervisors that she was transgender, Deluxe refused to let her use the women's restroom in violation of Title VII. The Commission further alleged that supervisors and coworkers subjected her to a hostile work environment, including hurtful epithets and intentionally using the wrong gender pronouns to refer to her.
- ***EEOC v. Lakeland Eye Clinic, P.A.*** (M.D. Fla. Civ. No. 8:14-cv-2421-T35 AEP filed Sept. 25, 2014, settled April 9, 2015). The EEOC sued Lakeland Eye Clinic, an organization of health care professionals, alleging that it discriminated based on sex by firing an employee because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes in violation of Title VII. According to the EEOC's lawsuit, the defendant's employee had performed her duties satisfactorily throughout her employment. However, after she began to present as a woman and informed the clinic she was transgender, Lakeland fired her. In April 2015, Defendant agreed to settle the case by entering into a two year consent decree which includes injunctive relief and \$150,000 in monetary damages.
- ***EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*** (E.D. Mich. Civ. No. 2:14-cv-13710-SFC-DRG filed Sept. 25, 2014). The EEOC sued Detroit-based R.G. & G.R. Harris Funeral Homes Inc., alleging that it discriminated based on sex by firing a funeral director/embalmer because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes in violation of Title VII. According to the EEOC's lawsuit, Amiee Stephens had been employed by Harris as a funeral Director/Embalmer since October 2007 and had always adequately performed the duties of that position. In 2013, she gave Harris a letter explaining she was undergoing a gender transition from male to female, and would soon start to present (e.g., dress) in appropriate business attire at work, consistent with her gender identity as a woman. Two weeks later, Harris's owner fired Stephens, telling her that what she was "proposing to do" was unacceptable. Defendant filed a motion to dismiss the complaint on November 19, 2014. The EEOC opposed the motion on December 10, 2014. On April 23, 2015, the court denied defendant's motion to dismiss. The court acknowledged that "even though transgendered/transsexual status is currently not a protected class under Title VII, Title VII nevertheless 'protects transsexuals from discrimination for failing to act in accordance and/or identify with their perceived sex or gender.'" *Id.* at 8. The court concluded that the EEOC had sufficiently pled a sex-stereotyping gender-

discrimination claim under Title VII because the Commission alleged that Stephen's failure to conform to sex stereotypes was the driving force behind the funeral home's decision to fire Stephens. *Id.* at 14.

- **EEOC v. Boh Bros. Constr. Co. LLC** (5th Cir. 11-30770). The Commission won a jury verdict in the amount of \$451,000 in this Title VII enforcement action with evidence showing that Chuck Wolfe, the supervisor of an all-male construction crew, harassed Kerry Woods, one of his subordinates, and created a hostile work environment. The district court subsequently reduced the verdict to \$301,000 because of statutory limits and also provided injunctive relief to prevent future discrimination. A panel of the Fifth Circuit reversed the jury verdict, and the EEOC sought rehearing en banc. In September 2013, a 10-6 majority of the Court of Appeals upheld the jury verdict except for the punitive damages award.

The Appellate Court held that a plaintiff alleging same-sex harassment can show that the harassment occurred because of sex by showing that it was motivated by the harasser's subjective perception that the victim failed to conform to gender stereotypes. The Court agreed with the Commission that this rule follows from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). The Court ruled that the focus is on the "harasser's subjective perception of the victim" and even an employer's "wrong or ill-informed assumptions about its employee may form the basis of a discrimination claim" since "[w]e do not require a plaintiff to prop up his employer's subjective discriminatory animus by proving that it was rooted in some objective truth." The Court then ruled that the Commission had offered sufficient evidence to sustain the jury's verdict that Wolfe harassed Woods because of sex (here, because Wolfe viewed Woods as "not manly enough"), and that Wolfe's harassment of Woods was sufficiently severe or pervasive to create a hostile environment. *See* 732 F.3d 444 (5th Cir. 2013) (en banc).

Private Sector Amicus Briefs

Transgender Status & Gender-Identity

- **Pacheco v. Freedom Buick GMC Truck, Inc.** (W.D. Tex. Civ. No. 7:10-cv-00116) (amicus brief submitted as attachment with motion for leave to file Oct. 17, 2011; district court denied motion for leave to file Nov. 1, 2011). Plaintiff Alex Pacheco filed suit alleging that defendant Freedom Buick GMC Truck, Inc. discharged her because she is transgender and failed to conform to male gender stereotypes, and that this is discrimination because of sex in violation of Title VII. Freedom moved for summary judgment. The Commission sought to file an amicus curiae brief in which the Commission took the position that, as a matter of law, disparate treatment of an employee because she is transgender is discrimination because of sex. The amicus brief argued that this is so for at least two reasons: (1) under the reasoning of the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), discrimination against a transgender individual because he or she does not conform to gender norms or stereotypes is discrimination "because of . . . sex" under Title VII; and (2) following the reasoning in *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), discrimination because an individual intends to change, is changing, or has changed his or her sex, is likewise prohibited by Title VII. The amicus brief also took the position that there were genuine issues of material fact that should preclude summary judgment on Pacheco's claim.

The Commission filed a motion for leave to file this amicus brief in the district court, and attached a copy of the brief to this motion. Freedom opposed the EEOC's motion for leave to file. The district court entered an order denying Freedom's motion for summary judgment. Later, the district court entered a separate order denying the EEOC's motion for leave to file its amicus brief. However, the district court did not strike the EEOC's motion for leave to file (or the proposed amicus brief, which was attached to the EEOC's motion) from the public docket sheet for the case.

- **Chavez v. Credit Nation Auto Sales, LLC** (N.D. Ga. No. 1:13-cv-0312) (amicus brief filed June 5, 2014). Plaintiff worked as a mechanic for Credit Nation, a company that sells and repairs cars. In 2009, she informed her employer that she intended to transition from male to female. Some months later, she was terminated after a supervisor photographed her sleeping in a car during working hours. She then filed suit under Title VII, alleging that she was fired because of her gender. In moving for summary judgment, defendant argued that the plaintiff did not exhaust her administrative remedies because she failed to file a timely charge. The Commission filed an amicus curiae brief in the district court, limited to this issue. The Commission argued that the charge-filing limitations period should be tolled because before finally accepting the plaintiff's charge, EEOC had twice refused on the ground that "transgendered persons cannot file claims for sex discrimination under Title VII."

In ruling on the summary judgment motion, the district court rejected defendant's exhaustion argument. Without mentioning EEOC's brief, the court noted that the "limitations period under Title VII may be equitably tolled if the EEOC misleads a complainant regarding the nature of his or her rights." In the court's view, that is what happened here. The court stated that "Title VII prohibits employers from discriminating against employees for failing to act and appear according to expectations defined by gender." (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989); *Glenn v. Brumby*, 683 F.3d 1312, 1316 (11th Cir. 2011)). The court reasoned that because the "very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior, . . . [d]iscrimination against a transgender individual because of the gender nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."

(citing *Brumby*, 683 F.3d at 1317) (adding that the "majority of federal courts" agree). Accordingly, the court concluded, "the EEOC misled [p]laintiff when it told [her] that she could not bring a claim for gender discrimination under Title VII," and, so, limitations on the claim "is required to be equitably tolled." The court went on to grant defendant's motion, however, finding no issue of fact as to whether the proffered reason for her termination - sleeping on the job - was pretextual. *See* 2014 WL 4585452 (N.D. Ga. Sept. 12, 2014).

- ***Lewis v. Highpoint Reg'l Health Sys.*** (E.D.N.C. No. 5:13-cv-838-BO) (amicus brief filed Oct. 30, 2014). Plaintiff, a transgender female, alleges that defendant violated Title VII by failing to hire her in 2013 because of her sex/gender. Plaintiff alleges that during the interview process, she was interviewed by a group of peer nurses who ridiculed her regarding her sex. Defendant informed plaintiff that it was looking for someone with more experience. Although plaintiff had the qualifications for the position, she was not hired; rather, she alleges that an individual with less experience was hired for the position. Defendant filed a motion to dismiss arguing that Title VII does not prohibit "sexual orientation" discrimination.

In an amicus brief, the EEOC argued the district court should deny defendant's motion to dismiss and hold that failing to hire an individual because she is transgender violates Title VII. The EEOC explained that sexual orientation is a different concept altogether than transgender status or gender identity. The EEOC further explained that courts have recognized that Title VII's prohibition on sex discrimination encompasses discrimination based on the failure to conform to gender expectations. Thus, discrimination against a transgender individual for non-conformance with gender norms is sex discrimination. Further, the EEOC argued, specific evidence of gender stereotyping is not necessary because consideration of gender stereotypes is inherently part of what drives transgender discrimination.

On October 30, the district court granted the EEOC's motion for leave to file its amicus brief. The court noted that "[i]t is clear that this Court's ruling will implicate the interpretation and effective enforcement of Title VII, and therefore the EEOC has an interest in this matter. Further, as plaintiff is *pro se*, and the EEOC is the expert agency on the matter of Title VII, the EEOC's amicus brief will be of aid to the Court in its decisional process."

On January 15, 2015, the district court denied defendant's motion to dismiss (as well as plaintiff's motion for summary judgment). The court noted that "[n]owhere in her complaint does plaintiff allege discrimination on the basis of sexual orientation." Further, the court concluded, "neither the Supreme Court nor the Fourth Circuit's Title VII jurisprudence has addressed transgender[] status, which, as amicus EEOC points out, is different than sexual orientation." The Court declined to resolve whether "plaintiff's complaint fits within a gender-stereotyping framework" since "the issue was not raised in defendant's motion to dismiss" *See* 2015 WL 221615 (E.D.N.C. Jan. 15, 2015).

- ***Jamal v. Saks & Co.*** (S.D. Tex. No. 4:14-cv-02782) (amicus brief submitted with motion for leave to file Jan. 22, 2015). Plaintiff, a transgender individual, alleges that defendant violated Title VII by harassing and discharging her because of her sex/gender. Plaintiff alleges that managers and co-workers referred to her using male pronouns, despite her requests to use female pronouns. Further, plaintiff alleges that management told her to change her appearance to a more masculine one, not to wear makeup or feminine clothing, and to separate her home life from her work life. She filed an EEOC charge and was fired ten days later. Defendant filed a motion to dismiss arguing that Title VII does not protect "transsexuals." Defendant further argued that plaintiff failed to comply with the administrative prerequisites to suit because her EEOC charge described her as a male yet her complaint used the pronoun "her." Finally, defendant argued that plaintiff could not state a claim for retaliation because she had no reasonable belief that the conduct she complained of violated Title VII.

In its proposed amicus brief, the EEOC argues that the district court should deny defendant's motion to dismiss and hold that discrimination against an individual because she is transgender violates Title VII. As it did in its amicus brief in *Lewis* (above), the EEOC explains that courts recognize that Title VII's prohibition on sex discrimination encompasses discrimination based on the failure to conform to gender expectations. Thus, discrimination against a transgender individual for non-conformance with gender norms is sex discrimination. Further, the EEOC contends, specific evidence of gender stereotyping is not necessary because consideration of gender stereotypes is inherently part of what drives transgender discrimination. Additionally, the EEOC argues, the district court should hold that plaintiff's EEOC charge satisfied the administrative prerequisite to a suit alleging transgender discrimination, as the discrimination alleged in the charge is the same discrimination as that alleged in the complaint. Finally, the EEOC urges the district court to hold that plaintiff's act of filing a charge with the EEOC and opposing conduct that a reasonable person would believe is unlawful is protected activity for purposes of a retaliation claim. The EEOC explains that Title VII's "participation clause" protects an individual from retaliation for filing a charge, without limitation (e.g., a showing that plaintiff's charge was filed "in good faith"). Plaintiff's "opposition clause" claim also should proceed because she could have a good faith, reasonable belief that transgender-based discrimination violates Title VII.

On January 26, 2015, Saks withdrew its motion to dismiss plaintiff's claim. On March 4, 2015, the parties filed a stipulation agreeing to dismiss the action with prejudice.

Sexual Orientation

- ***Muhammad v. Caterpillar Inc.*** (7th Cir. No. 12-173) (amicus brief filed October 9, 2014). Plaintiff-Appellant Warnether Muhammad filed this Title VII suit against his employer Caterpillar, Inc., alleging that his co-workers created a sex- and race-based hostile work environment. He also alleged that his supervisor unlawfully retaliated by suspending him after he complained about the harassment. The alleged harassment included anti-gay comments and conduct. The district court granted the defendant's motion for summary judgment on all claims. A panel of the U.S. Court of Appeals for the Seventh Circuit affirmed, in part on the grounds that Title VII does not prohibit sexual-orientation harassment, or retaliation against individuals who oppose it in the workplace. Muhammad petitioned for panel rehearing.

In an amicus curiae brief supporting the petition, the Commission argued that part of the panel's ruling rests on the sweeping proposition that Title VII's prohibition on discrimination "because of sex" does not prohibit discrimination based on sexual orientation. Yet an increasing number of courts, as well as the EEOC (the primary Agency charged with enforcing the statute), have recognized that intentional discrimination based on an individual's sexual orientation can be proved to be grounded in sex-based norms, preferences, expectations, or stereotypes. For example, in *Terveer v. Billington*, 2014 WL 1280301 (D.D.C. Mar. 31, 2014), the U.S. District Court for the District of Columbia held that a plaintiff's allegation that discrimination occurred because of "plaintiff's status as a homosexual" - without more - plausibly suggested the discrimination was based on gender stereotypes, and thus stated a Title VII *sex*-discrimination claim. Accordingly, Title VII's anti-retaliation rule protects individuals who in good faith oppose sexual-orientation discrimination in the workplace. The EEOC argued that for these reasons, the panel should modify the categorical statements to the contrary in its opinion, overruling the Circuit's precedent if necessary.

On October 16, 2014, the panel denied the petition for rehearing. But in a significant step, the panel issued an amended opinion removing its original rulings regarding the scope of Title VII coverage. The opinion no longer repeats or relies upon statements from prior Seventh Circuit decisions that Title VII does not prohibit sexual-orientation discrimination or retaliation for related opposition conduct. The revised panel opinion affirms the district court's summary-judgment for Caterpillar on other grounds, on which the Commission took no position. *See* 767 F.3d 694 (7th Cir. 2014), 2014 WL 4418649 (7th Cir. Sept. 9, 2014, as Amended on Denial of Rehearing, Oct. 16, 2014).

Public Conciliation Agreements

- **Don's Valley Market** (public conciliation agreement announced Sept. 2013). A Rapid City, S.D. supermarket agreed to pay \$50,000, obtain professional anti-discrimination training annually for all its employees, and provide a letter of apology and neutral reference (among other relief) to a former employee who was fired for being transgender. This resolution was reached as part of the EEOC's administrative conciliation process, without resort to litigation.